

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Insight Kentucky Partners II, L.P.	)	CSR 8129-E
	)	
Petition for Determination of Effective	)	
Competition in Eight Communities in Kentucky	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 21, 2011**

**Released: February 14, 2011**

By the Senior Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. Insight Kentucky Partners II, L.P., hereinafter referred to as “Petitioner,” has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in the eight communities listed on Attachment A and hereinafter referred to as the “Communities.” Petitioner alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”),<sup>1</sup> and the Commission’s implementing rules,<sup>2</sup> and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”), and Dish Network (“Dish”).

2. Comments opposing the petition were filed by the Telecommunications Board of Northern Kentucky (the “Board”), which is the local regulator of cable service in six of the eight Communities.<sup>3</sup> Petitioner filed a reply.<sup>4</sup> After careful consideration of the parties’ contentions and for the reasons set forth below, we grant the petition based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

3. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>5</sup> as that term is defined by Section 623(1)(1) of the Communications Act and Section 76.905(b) of the Commission’s rules.<sup>6</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present

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<sup>1</sup> See 47 U.S.C. § 543(1)(1)(B).

<sup>2</sup> 47 C.F.R. § 76.905(b)(2).

<sup>3</sup> Comments of Telecommunications Board of Northern Kentucky in Opposition to Insight’s Petition for Determination of Effective Competition, received March 18, 2009 (“Comments”). The Communities in which the Board regulates cable service are Elsmere, Edgewood, Independence, Ryland Heights, Taylor Mill, and Villa Hills. Comments at 1.

<sup>4</sup> Reply Comments on Petition for Determination of Effective Competition, dated March 30, 2009.

<sup>5</sup> 47 C.F.R. § 76.906.

<sup>6</sup> See 47 U.S.C. § 543(1)(1) and 47 C.F.R. § 76.905(b).

within the relevant franchise area.<sup>7</sup>

## II. DISCUSSION

### A. The Competing Provider Test

4. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (i) served by at least two unaffiliated multi-channel video programming distributors (“MVPDs”), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.<sup>8</sup> This test is to as the “competing provider” test.

#### 1. First Part

5. The first part of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.<sup>9</sup>

6. Turning to the first part of this test, it is undisputed that the Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.<sup>10</sup> The Commission has held that a party may use evidence of penetration rates in the franchise area (the second part of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.<sup>11</sup> The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming<sup>12</sup> and is supported in the petition with copies of channel lineups for both DIRECTV and Dish.<sup>13</sup> Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.<sup>14</sup> The Board does not dispute that Petitioner has satisfied the first part of the competing provider test. Accordingly, we find that Petitioner has satisfied that part of the test.

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<sup>7</sup> See 47 C.F.R. §§ 76.906 & 907.

<sup>8</sup> 47 U.S.C. § 543(1)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

<sup>9</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>10</sup> See Petition at 3.

<sup>11</sup> *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

<sup>12</sup> See 47 C.F.R. § 76.905(g). See also Petition at 5-6.

<sup>13</sup> See Petition at Exh. 4.

<sup>14</sup> See *id.* at 2-3.

## 2. Second Part

7. The second part of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in the Communities.<sup>15</sup> The second part of the test thus requires Petitioner to calculate the ratio of DBS subscribers to the number of households in each Community. To estimate the number of DBS subscribers, Petitioner purchased a report from the Satellite Broadcasting & Communications Association showing the numbers of subscribers attributable to the DBS providers in each nine-digit zip code area in each Community.<sup>16</sup> Media Business Corporation (“MBC”), on Petitioner’s behalf, used those subscriber numbers to calculate the numbers of DBS subscribers in each Community.<sup>17</sup> For the number of households in each Community, MBC used the number of households taken from the 2000 U.S. Census.<sup>18</sup> In each Community, the resulting ratio is in excess of 15 percent.<sup>19</sup> Petitioner’s numbers, if accepted, shows that it is subject to competing provider effective competition in all eight Communities.

8. The record herein reveals no reason not to accept the numbers that Petitioner presented for the two Communities, Alexandria and Crestview, that are not regulated by the Board. We adopt the numbers for those Communities. Accordingly, the second part of the competing provider test has been satisfied in Alexandria and Crestview and Petitioner is subject to competing provider effective competition in those Communities.

9. In the remaining six Communities, the Board appears to have no objection to Petitioner’s asserted numbers of DBS subscribers, and we accept them also. The Board makes several objections, however, to the numbers of households asserted by Petitioner in the remaining six Communities. First, the Board objects generally to what it calls “a nine-year mismatch in the two data sets”<sup>20</sup> – DBS subscriber numbers from 2008 and household numbers from 2000. This general objection is one that we have rejected many times,<sup>21</sup> holding that the most recent number from the U.S. Census suffices to sustain the petitioning cable operator’s burden of proof of the number of households in a community. More recent and equally reliable numbers may be submitted, but are not necessary.<sup>22</sup> We reaffirm these

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<sup>15</sup> See Petition at 7 & Exh. 1 (Declaration of Elizabeth M. Grier, Vice President, Administration for Petitioner, at ¶ 4, dated Jan. 30, 2009).

<sup>16</sup> Petition at Exh. 7. Zip code plus four numbers allocate DBS subscribers to a franchise area using zip code plus four information. This generally reflects franchise area boundaries in a more accurate fashion than standard five digit zip code information.

<sup>17</sup> Petition at 8 & Exh. 6.

<sup>18</sup> Petition at 7 n.25.

<sup>19</sup> *Id.* at 8; see also Attachment A hereto.

<sup>20</sup> Comments at 3.

<sup>21</sup> In *Jones Intercable, Inc.*, 15 FCC Rcd 7257, 7258, n.10, ¶ 5 (2000), the Commission stated that decade-old Census data “satisfies effective competition decision requirements.”

<sup>22</sup> See, e.g., *Time Warner Cable Inc.*, 25 FCC Rcd 5457, ¶11 (2010) (“*Time Warner*”); *Comcast Cable Commun., LLC*, 24 FCC Rcd 1780, 1783-84, ¶ 13 (2009), *application for review pending*; *Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd 14141, 14144, ¶ 13 (“the most recent available Census data may be used to show the number of households in a community”) (“*Cablevision*”), *stay denied*, 23 FCC Rcd 17012 (2008), *application for review pending*; *Cable Operators’ Petitions for Reconsideration & Revocation of Franchising Authorities’ Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656, ¶ 2(3) (1994) (“With respect to household data, we realize that in many cases 1990 census data represents the most recent data available. Accordingly, we believe that 1990 census data is an appropriate measure of households”).

holdings here.<sup>23</sup> Because this is the only objection that the Board makes to Petitioner's household numbers in three of the Communities that the Board regulates (Elsmere, Ryland Heights, and Villa Hills), we find no flaw in Petitioner's calculations of DBS subscribership there. Accordingly, we find that the second part of the competing provider test has been satisfied in Elsmere, Ryland Heights, and Villa Hills, and that Petitioner is subject to competing provider effective competition in those Communities.

10. In the three other Communities in which it regulates cable service – Edgewood, Independence, and Taylor Mill – the Board does propose household numbers other than Petitioner's 2000 Census numbers, and they merit closer attention. As already noted, we will accept household numbers other than the most recent decennial Census number if they are, in addition to being more recent, at least as reliable a measure of households.<sup>24</sup> In Independence, the Board proposes a more recent Census Bureau number, an estimate that shows the number of households in that Community rising from 5,181 in the 2000 to 6,660 in 2005-07.<sup>25</sup> We accept the latter number because it measures precisely what Section 632(l)(1)(B)(ii) of the Act calls for – households – and it is more recent than Petitioner's proffered 2000 number.<sup>26</sup> Even the relatively recent, high number, however, shows DBS subscribership in Independence of almost 22 percent,<sup>27</sup> well above the 15 percent statutory minimum.

11. The Board has proffered more household numbers as substitutes for Petitioner's 2000 Census numbers. These numbers are for Edgewood, Independence, and Taylor Mill. Their source is a local government authority, the Public Value Administrator of Kenton County, Kentucky, the County that contains those three Communities. The Public Value Administrator (the "PVA") maintains records of real property, residential and commercial, in the County, and the Board proffers the PVA's numbers of "residential units" in the three Communities as of early 2009. The PVA defines "residential units" as "single family, condominiums, two family, mobile homes, and apartment units."<sup>28</sup> The PVA's "residential unit" numbers are all substantially higher than the 2000 Census numbers of households proffered by Petitioner and would, if accepted, show DBS subscribership below the statutory minimum for competing provider effective competition in the three Communities.<sup>29</sup>

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<sup>23</sup> The Board cites two decisions that use DBS and household numbers that are closer in time than the ones Petitioner has proffered in this case. Those cases do not, however, require such data or disapprove the kinds of numbers that Petitioner has proffered here. In *Mountain Cable Co.*, 14 FCC Rcd 13994, 13998-400, ¶¶ 9-11, 14001, ¶ 16 (1999), the petitioning cable operator and the protesting franchising authority agreed upon post-decennial Census household numbers. Petitioner and the Board have not done so here. See Reply at 9-10. In *Texas Cable Partners, L.P.*, 16 FCC Rcd 4718, 4720-22, ¶¶ 5-8 (2001), the petitioning cable operator presented presumptively reliable household numbers that were more recent than Census numbers, and the franchise authorities failed to impeach them and did not present better numbers. In this proceeding, the Board presents household numbers that are more recent than the 2000 Census, but (with one exception discussed in the following paragraphs) Petitioner disputes them and we find them an unreliable measure of households.

<sup>24</sup> See authorities cited *supra* note 22. See also *Adelphia Cable Comm.*, 22 FCC Rcd 4458, 4462, ¶ 14 (2007); *Bright House Networks, LLC*, 22 FCC Rcd 4390, 4393, ¶ 11 (2007); *Bright House Networks, LLC*, 22 FCC Rcd 4161, 4165, ¶ 11 (2007).

<sup>25</sup> Comments at 5 & Exh. A.

<sup>26</sup> We have accepted household numbers created by the Census Bureau after decennial censuses in several cases. See *Time Warner*, *supra* note 22, at ¶ 22; *CoxCom, Inc.*, 25 FCC Rcd 3233, 3235, ¶ 7, n.17 (2010); *Charter Comm.*, 25 FCC Rcd 287, 288, ¶ 7 (2010).

<sup>27</sup> See Attachment A hereto.

<sup>28</sup> Supplement to Comments of Telecommunications Board of Northern Kentucky in Opposition to Insight's Petition for Determination of Effective Competition (received March 19, 2009), attached Declaration of Mark Vogt, PVA of Kenton County, at ¶ 4 (dated March 18, 2009).

<sup>29</sup> Comments at 5-6.

12. We do not find the PVA's "residential unit" numbers a sufficiently reliable measure of households, which is the statutory criterion, to use them instead of Census numbers of households. A household is an *occupied* housing unit,<sup>30</sup> and it not clear that the PVA's numbers exclude *unoccupied* housing units.<sup>31</sup> Indeed, PVA's number of the "residential units" in Independence (10,146), is so much higher than the 2005-07 Census number of households for Independence (6,660) as to create a suspicion that "residential units" include a significant number of things that are not households, such as unoccupied housing units.<sup>32</sup> Accordingly, the PVA's numbers proffered by the Board, although more recent than the Census numbers, are not a reliable measure of households, and we reject the PVA's numbers as the best available measurement of households in the three Communities.<sup>33</sup>

13. These most recent Census numbers, displayed on Attachment A hereto, show that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the three Communities of Independence, Taylor Mill, and Edgewood. Therefore, the second part of the competing provider test is satisfied for each of those Communities.

14. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both parts of the competing provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment A.

### III. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Insight Kentucky Partners II, L.P., **IS GRANTED**.

16. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

17. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>34</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckert  
Senior Deputy Chief, Policy Division, Media Bureau

<sup>30</sup> *Cablevision*, 23 FCC Rcd at 14150, ¶ 30; *Comcast Cable Commun., LLC*, 23 FCC Rcd 8564, 8567, ¶ 10 (2008); *Bright House Networks, LLC*, 22 FCC Rcd 4161, 4165, ¶ 11 (2007).

<sup>31</sup> Reply at 7.

<sup>32</sup> In addition, it is possible that the PVA includes parcels of real estate on which no building of any kind has been constructed. Comments at 5 (the PVA "requires that every parcel of real property be assigned an identification number"); Reply at 9. There are also grounds to be skeptical of claims that households in the three Communities have increased significantly since 2000. The Census estimates that the population of two of the Communities has declined between 2000 and 2007 (Reply at Exh. 2).

<sup>33</sup> *Accord, Adelphia Cable Commun.*, 22 FCC Rcd 4458, 4462-63, ¶ 14 (2007) (using decennial Census data for households rather than more recent "occupancy permits" because it is unclear whether the latter exclude unoccupied housing units); *see also* authorities cited *supra* note 30.

<sup>34</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

## CSR 8129-E

## COMMUNITIES SERVED BY INSIGHT KENTUCKY PARTNERS II, L.P.

Communities	CUID(s)	CPR*	Census Households	Estimated DBS Subscribers
Villa Hills	KY0693	18.23%	2808	512
Ryland Heights	KY0748	48.46%	293	142
Independence	KY0609	22.39%	6660	1491
Taylor Mill	KY0691	15.83%	2552	404
Edgewood	KY0673	17.07%	3099	529
Elsmere	KY0674	19.43%	3001	583
Alexandria	KY0662	17.27%	2884	498
Crestview	KY0671	21.69%	166	36

\*CPR = Percent of competitive DBS penetration rate.